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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 326

DANIEL E. WILLMORE, *Petitioner*

v.

PAMELA H. WILLMORE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

SAMUEL J. L'HOMMEDIEU, JR.
1627 K Street, N. W.
Washington, D. C. 20006
Attorney for Petitioner

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DANIEL E. WILLMORE, Petitioner, prays that a writ of certiorari issue to review the opinion of the Supreme Court of the State of Minnesota, entered in the above-entitled cause on April 15, 1966.

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the Minnesota District Court, Fourth Judicial Circuit, filed September 9, 1965, is unreported and is printed in Appendix A hereto, *infra*, p. 2a.

The memorandum opinion of the Minnesota District Court, Fourth Judicial Circuit, filed November 15, 1965, is unreported and is printed in Appendix B hereto, *infra*, p. 8a.

The memorandum opinion of the Minnesota Supreme Court, filed April 15, 1966, is unreported and is printed in Appendix C hereto, *infra*, p. 10a.

JURISDICTION

The judgment of the Minnesota District Court, denying, in pertinent part, the Petitioner's motion for a summary judgment, was filed on September 9, 1965; (Appendix A, *infra*, p. 1a) Rehearing was denied on November 15, 1965; (Appendix B, *infra*, p. 7a) The Syllabus of the Minnesota Supreme Court, affirming the judgment of the Minnesota District Court, was filed on April 15, 1966; (Appendix C, *infra*, p. 9a), while judgment thereon was stayed until June 10, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether the Minnesota Court has jurisdiction to determine the custody of minor children of parents where one parent is a non-resident of the State of Minnesota, and personal service is not obtained on the non-resident parent; and where neither the non-resident parent, nor the minor children of the parties, are present within the State of Minnesota at the time of the attempted exercise of jurisdiction.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the FOURTEENTH AMENDMENT to the Constitution of the United States, Section 1, which provides:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

The essential statement of this case can be extracted from the orders, motions, etc., which appear as appendices to this petition.

Prior to November 7, 1964, the Petitioner and the Respondent resided in Washington, D. C., with their two minor children. On November 7, 1964, without the knowledge or consent of the Petitioner, the Respondent removed the children to the home of the Respondent's mother in St. Louis Park, Minnesota. On December 21, 1964, the Petitioner went to said home in St. Louis Park, regained custody of them, and neither the Petitioner, nor the minor children, have been in the State of Minnesota since about December 21, 1964. (Appendix C, *infra*, p. 11a)

On or about March 27, 1965, the Respondent-wife commenced an action for, *inter alia*, separate maintenance and custody of the minor children, in the District Court, Fourth Judicial Circuit, of Minnesota. (Appendix D, *infra*, p. 17a) The Petitioner was served by publication. (Appendix C, *infra*, p. 10a) On May 21, 1965, the Petitioner filed a motion and affidavit to dismiss the action for separate maintenance and custody, alleging lack of Minnesota jurisdiction over the subject matter of the action and lack of Minnesota jurisdiction over the person of the Petitioner. (Appendix E, *infra*, p. 20a). By stipulation of the parties, dated June 4, 1965, the Petitioner substituted said motion to dismiss with a motion for partial summary judgment, which said motion for partial summary judgment was filed on June 4, 1965. The Petitioner again alleged lack of jurisdiction. (Appendix F, *infra*, p. 22a) On September

9, 1965, by memorandum opinion, the District Court of Minnesota, Fourth Judicial Circuit, denied, in pertinent part, the Petitioner's motion for partial summary judgment, indicating, "The only question presented which is in dispute between the parties is whether our Minnesota District Court has jurisdiction to pass upon the custody of the parties' two children." (Appendix A, *infra,* p. 2a) A petition for rehearing was denied on November 15, 1965. (Appendix B, *infra,* p. 7a) By Syllabus, filed April 15, 1966, the Supreme Court of Minnesota affirmed the judgment of the District Court. In its memorandum opinion accompanying said Syllabus, the Minnesota Supreme Court directed itself to the constitutional question sought to be reviewed: "The essential problem is whether, under the facts presented, the Minnesota Court has jurisdiction to determine the right of custody of the minor children of the parties." (Appendix C, *infra,* p. 10a)

The record in this case will show that the Petitioner, and the children of the parties, had not been present in the State of Minnesota for a period of over three (3) months *prior* to the attempted exercise of jurisdiction by the Minnesota District Court. (Appendix E, *infra,* p. 21a) The record will further show that the attempted exercise of jurisdiction was based on a period from November 7, 1964, to on, or about, December 21, 1964, when the children of the parties were in the State of Minnesota against the wishes of the non-resident parent. (Appendix C, *infra,* p. 11a) The record will show that the Respondent conditioned the Petitioner's seeing or visiting his children on the execution of a custody agreement awarding her complete custody of the children. (Appendix G, *infra,* p. 24a)

REASONS FOR GRANTING THE WRIT

I

The Minnesota Supreme Court, in Affirming the Denial, in Pertinent Part, of the Petitioner's Motion for a Partial Summary Judgment, Has Rendered a Decision in Direct Conflict With the Applicable Decisions of This Court.

The decision of this Court in *May* v. *Anderson*, 345 U.S. 528 (1953), seems to firmly establish the non-entitlement of Minnesota to bind the Petitioner by an award of custody, without having *in personam* jurisdiction of the Petitioner.

The parties in that case were married in Wisconsin and established their marital domicile in Wisconsin. The wife subsequently took the children of the marriage to Ohio with the husband's approbation. The wife then decided to remain in Ohio, causing the husband to file suit in Wisconsin, seeking a divorce and custody of the minor children. The wife was personally served in Ohio, but made no appearance in the Wisconsin proceedings. The husband was awarded custody by the Wisconsin Court, obtained custody of the children in Ohio, and returned to Wisconsin. The husband and children lived in Wisconsin for several years, but during a visit to Ohio the mother obtained, and then refused to relinquish, physical custody of the children. The Ohio Court, on petition for a writ of habeas corpus, and giving credence to the Wisconsin decree, awarded custody of the children to the father. Upon reviewing the matter, this Court said, in the *May* case, at p. 533:

> "[W]e have before us the elemental question whether a court of a state, where a mother is neither domiciled, resident nor present, may cut off her immediate right to the care, custody, management and companionship of her minor children without having jurisdiction over her *in personam*. Rights far more precious to appellant than property rights will be cut off if she is to be bound by the Wisconsin award of custody."

This Court said that the mother would not be bound by the Wisconsin award of custody. The Minnesota Court, by asserting a right to determine custody, in the absence of *in personam* jurisdiction over the Petitioner, is acting in direct conflict with this Court's holding in *May* v. *Anderson, supra.*

In the instant case, the Petitioner has never been a domiciliary nor a resident of the State of Minnesota. Neither the Petitioner nor the children were present in the State of Minnesota, for a period of over three months *prior* to the commencement of the Respondent's action for separate maintenance. (Appendix E, *infra,* p. 21a) In the instant case the *only* presence of the children in the State of Minnesota was for a period from November 7, 1964, until on or about December 21, 1964, when the children were taken from the District of Columbia by the Respondent, without the knowledge and consent of the Petitioner. (Appendix C, *infra,* p. 11a) In the instant case, the only service on the Petitioner was by publication and the only appearance was a special appearance to attack the jurisdiction of the Minnesota Court. (Appendix E, *infra,* p. 20a)

It is conceded that the Petitioner is not yet "bound by an award of custody." If the Petitioner cannot be bound by an award of custody, the attempted exercise of jurisdiction by the Minnesota Court conflicts with the essential spirit and meaning of this Court's decision in *May* v. *Anderson.*

II

The Precise and Important Question Presented by the Instant Case, Has Been Reserved, But Not Decided by This Court.

In *Halvey* v. *Halvey,* 330 U.S. 610, (1947), a strikingly similar fact situation was presented to this Court. In that case, the Halveys were married in 1937 and lived in New York until 1944. In 1938 a son was born and in 1944, without the husband's consent, the wife took the child and went to Florida, where she established a residence. In

1945 she commenced a suit for divorce and custody, with service by publication on the husband. A day before the decree was granted, the husband took the child back to New York and the Florida Court awarded custody to the wife.

This Court said, at p. 615:

> "The narrow ground on which we rest the decision makes it unnecessary for us to consider several other questions argued, *e.g.* whether Florida at the time of the original decree had jurisdiction over the child, the father having removed him from the State after the proceedings started but before the decree was entered; whether in the absence of personal service the Florida decree of custody had any binding effect on the husband; . . . On all these problems we reserve decision."

This Court has answered the question of binding effect in the absence of personal service, in *May* v. *Anderson, supra.* This Court said, at page 532:

> "The narrow issue thus presented was noted but not decided in *Halvey* v. *Halvey,* 330 U.S. 610, 615-616. . . . We were not compelled to answer it and a decision on it was expressly reserved."

The language of *May* v. *Anderson* seems to compel the conclusion that any custody decree which the Minnesota Court might enter would not be binding on the Petitioner. The present case compels this Court's attention to the jurisdictional question which was reserved but not answered in the *Halvey Case, supra.*

It is the attempted exercise of jurisdiction by the Minnesota Court that is the crux of the relief which this Petitioner seeks. The Respondent seeks to invoke the jurisdiction of the Minnesota Court to determine custody of the children, based on a brief period from November 7, 1964, until December 21, 1964, when the children were taken from the last and only common matrimonial domicile in the District of Columbia, and removed to Minnesota without the knowledge and consent, and against the wishes, of the Petitioner.

The Minnesota Court is giving its judicial blessing to a theory of jurisdiction which can lead only to chaos. The Court is stating that once a parent can establish presence in the jurisdiction, for no matter how brief a time, Minnesota will retain jurisdiction to determine custody of the children. This, in the face of a delay of over three months, in seeking to invoke that jurisdiction. The Petitioner has looked in vain for a precedent.

The Minnesota Court is also stating the novel proposition that the Petitioner has the burden of showing a jurisdiction, other than Minnesota, which might be a "potential jurisdiction." (Appendix A, *infra,* p. 3a) The District Court asserts that "the [Petitioner] has not established in what state or foreign country the children may be so as to indicate a potential jurisdiction other than Minnesota which could determine custody if the [Petitioner] is right in his claim that the children's domicile no longer is Minnesota." (Appendix A, *infra,* p. 3a) If the Petitioner is right in his claim, it is because the Respondent has not met the burden of disproving that the children's domicile remained in the District of Columbia.

In effect the Respondent has asked the Minnesota Court to sustain jurisdiction for purposes of custody, based on the furtive removal of the children from the District of Columbia without the Petitioner's consent. The Respondent then contends that the regaining of custody of the children by the Petitioner, necessarily furtive though it was, robs him of the right to question the Respondent's wrongful conduct. The Minnesota Court has, for some mysterious reason, lent judicial credence to this apparent inconsistency. The Respondent has not sustained the burden of proving jurisdiction in Minnesota, and the Minnesota Court cannot obviate that essential requirement, by demanding the Petitioner to demonstrate some other "potential" jurisdiction.

The Minnesota Supreme Court, itself, seems to recognize the inefficacy of the Respondent's attempt to change the domicile of the children. In the recent case of *State* v.

Glasier, 272 Minn. 62, 137 N.W. 2d 549 (1965), that Court said, at page 555:

> "While respondent took the children out of the State of Washington at a time when no court order concerning their custody was in existence, we hold that his surreptitious removal of the children did not transfer their domicile out of the state."

No matter what inspired the Petitioner's reservations about appearing in the Minnesota proceedings, the Minnesota Court cannot, without ignoring or doing violence to Constitutionally-guaranteed rights of due process, excise the Petitioner's custodial rights. The Petitioner may well have been inspired by what he feels to be a judicial antipathy towards the rights of fathers where the question of custody is at issue. *Whatever* the reservations, they cannot form the basis for an unwarranted, and unconstitutional, extraterritorial *fiat* by the Minnesota Court.

The fact situation herein seems to focalize on and compel the answer to, the narrow question reserved, but undecided, in *Halvey* v. *Halvey, supra.*

In the present case, the Petitioner's relief is inextricably involved with the question of, "whether [Minnesota] at the time of the original [action] had jurisdiction over the child[ren]." *Halvey* v. *Halvey*, 330 U.S. 610, 615. If Minnesota can assume jurisdiction in this case, this Court's decision in *May* v. *Anderson, supra,* is rendered inexplicable, while the reserved but unanswered "jurisdictional" question of *Halvey* v. *Halvey, supra,* becomes academic.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

SAMUEL J. L'HOMMEDIEU, JR.
Attorney for Petitioner

APPENDIX A

Order and Memorandum Granting in Part and Denying in Part, Petitioner's Motion for Summary Judgment Filed September 9, 1965

STATE OF MINNESOTA, COUNTY OF HENNEPIN
DISTRICT COURT, FOURTH JUDICIAL DISTRICT

Case No. 612151

PAMELA H. WILLMORE, *Plaintiff*,

v.

DANIEL E. WILLMORE, *Defendant*.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

On June 4, 1965, the undersigned heard the defendant's motion for partial summary judgment.

Counsel appearances were: Ira C. Peterson, Jr., for the defendant and Raymond C. Ploetz for the plaintiff.

Subsequent to the oral argument the attorneys filed briefs, the last brief being filed August 13, 1965.

The Court having considered the arguments of counsel and the briefs filed, on all the files, records and proceedings herein,

IT IS ORDERED:

I

That defendant's motion for partial summary judgment is denied with respect to Paragraphs 2 and 9 of the prayer for relief in the plaintiff's complaint and it is

FURTHER ORDERED that defendant's motion for partial summary judgment is granted with respect to Paragraphs 3, 4, 5, 6, 7 and 8 in the prayer for relief of the plaintiff's complaint.

The defendant's motion for summary judgment with respect to Paragraph 3 through 8 in the prayer for relief of the plaintiff's complaint is granted with the condition that the order may be reversed hereafter if the plaintiff obtains personal jurisdiction of the defendant by service of process upon him within the State of Minnesota or otherwise.

The attached memorandum is hereby made a part hereof.

Dated: September 9, 1965.

/s/ DANA NICHOLSON,
Judge of District Court.

MEMORANDUM

On this motion for summary judgment the only question presented which is in dispute between the parties is whether our Minnesota District Court has jurisdiction to pass upon the custody of the parties' two children.

If the domicile of the children is in Minnesota, then there is no question but what the Minnesota District Court has such jurisdiction to determine custody. State ex rel, Beverly Glasier -vs- Fern Glasier and Darwin L. Glasier decided July 30, 1965 by our Minnesota Supreme Court.

For the purpose of the motion for summary judgment it must be assumed that the allegations of the plaintiff's complaint are true and one of the allegations therein is that the defendant has been guilty of cruel and inhuman treatment of the plaintiff within the contemplation of M.S.A. 518.06 (3). It must further be assumed that the plaintiff is a resident of Minnesota as alleged in the complaint and that she came to Minnesota with the parties' two children on November 7, 1964 and that she shortly thereafter determined to make Minnesota her home.

The defendant by a fraudulent subterfuge got the plaintiff out of her parents' home at five o'clock p.m. on Decem-

ber 21, 1964 and then seized the two children with the aid of his two brothers using force to restrain the plaintiff's parents while seizing the children.

Since the seizure of the children on December 21 the plaintiff has received no word of their whereabouts except a telegram dated December 23, 1964 from Pocatello, Idaho from the defendant wherein he says, among other things: "I have given up the Washington house," and a subsequent letter dated January 6, 1965 from the Panama Canal Zone. The letter from the defendant's attorney Mr. L'Hommedieu to plaintiff's attorney dated March 26, 1965 does not state where the children are nor in whose custody they are except to say: "I am also informed that the children are fine in all respects and furthermore I am informed that they are being well cared for." From the foregoing it appears that the defendant has been unwilling to disclose to the plaintiff what his present domicile is and what the domicile of the children may be. He has not indicated that the children are remaining with him, wherever he may be. He has indicated that possibly he has abandoned his Washington, D. C. domicile since he has given up the Washington home. Consequently the defendant has not established in what state or foreign country the children may be so as to indicate a potential jurisdiction other than Minnesota which could determine custody if the defendant is right in his claim that the children's domicile no longer is Minnesota.

My conclusion is that upon this state of the record I must conclude that the children's domicile remains in Minnesota since there has been no showing that their domicile has been changed to another particular jurisdiction and, furthermore, the evidence establishes that the effort to change the domicile from Minnesota was based upon fraud and was accomplished by force in violation of the assault laws of the State of Minnesota.